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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1276.

ELIZAVETA DANILA, NICOLAE DANILA, ELEANORA CATUT, ILENA POPESCU, GHEORGHE POPESCU, BUNEA POPESCU and IOAN POPESCU,

Petitioners,

vs.

GEORGE DOBREA,
Executor of the Estate of John Danila, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

The Respondent herein is at a loss to determine by what method of reasoning the Petitioners arrived at the two questions which he presented to this Court for consideration.

1. In submitting the case for the consideration of the Court of Appeals, Ninth Judicial District of Ohio, the Petitioners raised the issue which is now presented to this Court, by asking the Court of Appeals to reverse the decision of the Probate Court of Lorain County, State of Ohio, for the reason that: "Refusal of the executor to notify the specific legatees of the proceedings connected with the filing of the final account constituted a denial of due process of law. (Art. I, Sec. 16, Ohio Constitution) (14th Amendment of the Constitution of the United States.)"

2. Under the title, Statement of the Questions of Law Involved, as presented to the Supreme Court of Ohio, the Petitioners herein expand the questions of law involved. They presented the following three questions:

> "1. May the executor of an estate ignore and refuse to give notice to, an attorney of record for the specific legatees, regarding the filing and hearing of his final account, and other actions and proceedings affecting the rights of the specific legatees?
>
> "2. Must an executor of an estate give personal notice to specific legatees whose addresses are known to him or readily ascertainable?
>
> "3. Are the orders of the Probate Court approving the final account of an executor and appointing the executor as trustee of the distributive shares of the specific legatees, with no notice to the legatees or their counsel of record except by publication, in accordance with due process of law and binding upon said legatees?"

It is with deep regret that the Respondent must bring to the attention of the Court that the raising of the questions above were based not on the facts of the case, nor were the questions presented intended to clarify the law at any time, but most likely to confuse the issues.

3. On page 4 of the Petition for Writ of Certiorari the counsel leaves out of his quotation of Item III of the will, the part under which the decedent gives the executor discretionary power in creating a testamentary trust. The quotation of Item III of the decedent's will should be amended to include the following language:

> "In the event that my said executor, at his own discretion is convinced that the distribution made to the aforementioned relatives should be made beyond the closing date of the estate, it is my wish that he requests of the Probate Court of Lorain County to

appoint a trustee for the purpose of sending the share of my above mentioned relatives in the amounts of not more than $100. (One Hundred Dollars) per month until the Trust Estate will be completely exhausted."

The Respondent suggests that the statement of facts of this case be considered as they appear in the Memorandum of Opinion of Judge John W. Winn. (Petitioners' brief, Appendix "A," page 14.)

REASONS FOR DENYING THE WRIT.

1. The questions raised by the Petitioners in the Probate Court of Lorain County were properly answered at various stages of the proceedings, including the Petitioners' claim in the Court of Appeals that service by publication is a denial of due process.

2. If there is any question to be presented to this Court it will be the one concerning the unconstitutionality of Section 2109.35, Effect of Order Settling Account, Revised Code of Ohio. (Respondent's Appendix "C.")

3. In Ohio, as in many other jurisdictions, ex parte proceedings in the Probate Court are by nature of an action in rem. *Estate of Stafford,* 146 Ohio St., 253, Syl. 3:

> "There is the established law in Ohio, and in practically every jurisdiction in the United States that in an action in rem service by publication satisfies procedural due process as required in the Constitution of the United States."

The Handbook of American Constitutional Law, Page 143. Henry Rottschaefer:

> "Due process requires that those whose interest in the res will be affected by the judgment in an action in rem be given notice of, and an opportunity to be heard in the proceedings. Notice by publication is all

that is required in such action if the court has jurisdiction of the res."

42 *Yale Law Journal* 333, Walter Wheeler Cook:

> "Except in cases affecting the personal status of the plaintiff, an action in which that mode of service may be considered to have been assented to in advance as hereinafter mentioned, the substitute service of process by publication, allowed by the State of Oregon and by similar laws in other states where actions are brought against nonresidents, is effectual only where, in connection with the process against the person having commenced the action, property in the state is brought under the control of the court, subjected to its disposition by the process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem."

It is axiomatic that one may not take advantage of the rights afforded by a statute and then attack its constitutionality. This is the situation in this case where the Petitioners using the provisions of Section R. C. 2109.35 of the Ohio Code, filed a motion to set aside the final account. But, being dissatisfied with the decisions reached by the courts in hearing their motion, now claim that the said section is unconstitutional.

4. There is no magic formula in raising a constitutional question, but the courts demand that the claim of invalidity and the grounds therefor, be brought to the attention of the court with fair precision and due time. *Bryant vs. Zimmerman,* 278 U. S. 63.

5. At page 13 of the Petitioners' brief, a quotation is taken from *Mullane vs. Central Hanover Bank,* 339 U. S. 306 (pp. 314, 315). The Petitioners failed to notice the second paragraph at page 314 of the *Mullane* case which reads:

"* * * we disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books."

6. At page 313 of the *Mullane* case, the court uses the following language:

"In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the Trustee answer for negligent or illegal impairment of their interests. * * *"

Part of the Ohio Revised Statute 2109.35, as shown in the Petitioners' brief, Appendix "E," grants to a beneficiary entitled to notice by publication the very right which was denied to the beneficiaries of the trust in the *Mullane* case.

7. This Respondent takes no exception to the cases cited by the Petitioners, but strenuously objects to their interpretation of the Ohio Revised Code, Sec. 2109.35 (Respondent's Appendix "C"), which must be read and interpreted together with Sec. R. C. 2109.32 (Respondent's Appendix "A") and R. C. 2109.33 (Respondent's Appendix "B").

8. Let us examine the statutes mentioned above: Under Section 2109.32, Revised Code, every fiduciary account shall be set for hearing before the Probate Court:

(a) Within one month the court shall cause the publication of the notice of the filing of an account; and

(b) Set for a hearing on the account within thirty days; and

(c) At the hearing the court shall inquire into, consider and determine all matters pertaining to the

account as well as order the account approved and settle and discharge the fiduciary.

Section 2109.33 R. C. provides that, in addition to the notice required under Section 2109.32 R. C., a fiduciary *may serve notice* of the hearing upon the account, or *he may cause such notice to be served,* upon any person who has an interest in the estate or trust. The Probate Court after notice to the fiduciary, either upon the request of an interested party, or on its own motion, *may order that such notice be given.*

It is interesting to note that none of the provisions of Section 2109.33, R. C. are mandatory, and this applies equally to the fiduciary as well as the Probate Court which can act on its own motion.

It is obvious that the legislature in its wisdom believed it to be necessary to enact Section 2109.35, R. C. which can be considered some sort of savings clause since the provisions of this Section are such that if a fiduciary failed to give personal notice as suggested by Section 2109.33, Revised Code, an order in the settlement of a fiduciary account may be vacated by a motion filed, (a) within a year after discovery of fraud, or (b) by the showing of good cause by a person who was a party to the proceedings wherein such order was made solely by reason of his being served by publication in accordance with Section 2109.33, Revised Code and the person filing such motion must establish to the satisfaction of the court that he had no knowledge of the proceedings in time to appear.

It is a further requirement of this Section that the motion based on good cause shall also set forth the items in the account excepted to and the reasons therefor, verified by affidavit.

Part of Section 2109.35, Revised Code, under paragraph (D) states further that:

"* * * an order settling an account shall not be vacated unless the court determines that there is good cause for doing so and the burden of proof of good cause shall be upon the complaining party."

CONCLUSION.

It will be apparent from the records of this case that the Petitioners being dissatisfied with the decisions of the courts of the State of Ohio, attempt to have this Court receive the case at bar under the color of a constitutional question. May we draw the attention of this Court to the last two paragraphs of the per curiam opinion of the Court of Appeals of the Ninth Judicial District of Ohio. (Petitioners' Appendix "B.")

> "It is apparent that if a motion to vacate as is filed herein, is to be upheld, it must be in accord with Section 2109.35, Revised Code. In the instant case, to vacate the order of settlement, there must either be fraud established, or good cause shown as to why the order of approval should be set aside.
>
> This court has read the bill of exceptions, and has examined all of the files, in the light of the charges made by the movants. We, also, have examined the memorandum opinion of Judge John W. Winn. Our examination of the matters raised in this case, compels us to agree with the reasoning, and conclusion, set out by Judge Winn in his memorandum. There appears no good or compelling reason why anything further needs be said by this court. We must concur in the judgment rendered by him, as we find no error prejudicial to the substantial rights of the appellants."

It is apparent that the Supreme Court of Ohio could not find sufficient reason to overrule the lower courts and elected to dismiss the Petitioners' appeal for the reason that no substantial constitutional question existed. Re-

spondent maintains that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN J. SIBISAN,
Counsel for Respondent.

APPENDIX "A."

Section 2109.32, Revised Code of Ohio. Hearing on account; notice.

Every fiduciary's account required by section 2109.30 of the Revised Code shall be set for hearing before the probate court. Within one month after an account is filed, the court shall cause notice of the filing of such account and the time and place of the hearing thereon to be published once in some newspaper of general circulation in the county. The hearing on the account shall be set not earlier than thirty days after the publication of such notice. The costs of such notice, if more than one account is specified in the same notice, shall be paid in equal proportions by the fiduciaries.

At the hearing upon an account, the court shall inquire into, consider, and determine all matters relative to such account and the manner in which the fiduciary has executed his trust, including the investment of trust funds, and may order the account approved and settled or make such other order as the court deems proper. If, at the hearing upon an account, the court finds that the fiduciary has fully and lawfully administered the estate or trust and has distributed the assets thereof in accordance with the law or the instrument governing distribution, as shown in such account, the court shall order the account approved and settled and may order the fiduciary discharged.

APPENDIX "B."

Section 2109.33, Revised Code of Ohio. Service of additional notice; exceptions to account.

In addition to the notice required by section 2109.32 of the Revised Code, a fiduciary may serve notice of the hearing upon his account, or may cause such notice to be served, upon any person who is interested in the estate or trust. The probate court, after notice to the fiduciary, either upon the motion of any interested person for good cause shown or at its own instance, may order that such additional notice be served upon such persons as the court designates.

Such notice shall set forth the time and place of the hearing and shall specify the account to be considered and acted upon by the court at the hearing and the period of time covered by such account. It shall contain a statement to the effect that the person notified is required to examine such account, to inquire into the contents thereof and into all matters that may come before the court at the hearing thereon, and to file any exceptions which such person may have to such account at least five days prior to the hearing on the account, and that upon his failure to file exceptions thereto, the account may be approved without further notice. If the person to be notified was not a party to the proceeding wherein any prior account was settled, such notice, for the purpose of barring any rights possessed by such person, may include and specify such prior accounts and the periods of time covered thereby. In such event, the notice shall inform the person notified that the approval of the account filed most recently will terminate any rights possessed by him to vacate the order settling each prior account so specified, except as provided in section 2109.35 of the Revised Code, and shall further inform such person that, under penalty of losing such

rights, he forthwith shall examine each prior account so specified, shall inquire into the contents thereof, and, if he deems it necessary to protect his rights, shall take such action with respect thereto as is permitted by law.

* * * * *

APPENDIX "C."

Section 2109.35, Revised Code of Ohio. Effect of order settling account.

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) Such order may be vacated for fraud, upon motion of any person affected thereby or upon the court's own order, if such motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file such motion at any time within one year after the removal of such disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of such disability. If the death of any person occurs during the period within which he could have filed such motion, his administrator or executor may file such motion within one year after death.

(B) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was not a party to the proceeding wherein such order was made and who had no knowledge

of such proceeding in time to appear therein; provided that if the account settled by such order is included and specified in the notice to such person of the proceeding wherein a subsequent account is settled, the right of such person to vacate such order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding wherein such order was made if such person was served with notice of the hearing thereon in accordance with section 2109.33 of the Revised Code, waived such notice, consented to the approval of the account, filed exceptions thereto, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of such proceeding shall be deemed to have been a party thereto unless he was represented therein as provided in section 2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with division (B) of this section, if the motion to vacate such order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the limitation prescribed shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of such period.

(C) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was a party to the proceeding wherein such order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if such motion is filed within one year after such person acquires knowledge of such proceeding and in any event within three years after such order is made. Such person must estab-

lish to the satisfaction of the court that he had no knowledge of the proceeding in time to appear therein.

(D) Such order may be vacated for good cause shown upon motion of the fiduciary; if such motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining thereof, verified by affidavit.

The person filing a motion to vacate an order settling an account, or such other person as the court may designate, shall cause notice of the hearing thereon to be served upon all interested parties who may be adversely affected by the order of the court granting such motion.

An order settling an account shall not be vacated unless the court determines that there is good cause for doing so and the burden of proving good cause shall be upon the complaining party.

* * * * *